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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re SensorMedics Corporation

Serial No. 76376364

Jeffrey M. Olson and Samuel N. Tiu of Sidley Austin Brown & Wood for SensorMedics Corporation.

Ronald McMorrow, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Simms, Hohein and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

SensorMedics Corporation has filed an application to register the mark CONSTELLATION SERIES on the Principal Register for, as amended, "home care medical devices for the delivery of continuous positive airway pressure to patients for treatment of sleep apnea," in International Class 10.[1] In response to a requirement by the Examining Attorney,

[1] Serial No. 76376364, filed February 27, 2002, based on an allegation of a bona fide intention to use the mark in commerce.

applicant submitted a disclaimer of SERIES apart from the mark as a whole.

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark CONSTELLATION, previously registered for "medical apparatus, namely, medical catheters for diagnostic and/or therapeutic uses,"[2] that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

The Examining Attorney contends that the marks are essentially identical because the additional word SERIES in applicant's mark is a generic term and does not have any source-indicating significance. The Examining Attorney submitted a dictionary definition of "series" as "a number of similar or related events or things, one following another" (*Cambridge Dictionary of American English*, online edition); and copies of numerous third-party registrations for medical and dental products wherein the term SERIES is disclaimed.

[2] Registration No. 2,044,221 issued March 11, 1997, to EP Technologies, Inc., in International Class 10. [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

Regarding the respective goods, the Examining Attorney contends that medical devices for treatment of sleep apnea and catheters are related goods that often emanate from the same source; that some of the purchasers of both goods are the same because applicant's product must be set up by a medical professional; that the difference in price of the respective goods is not persuasive because the same entities produce both expensive and inexpensive medical devices; and that applicant's identification of goods is sufficiently broad to encompass registrant's catheters for use in the treatment of respiratory disorders. In support of his position, the Examining Attorney submitted copies of two third-party registrations owned by a single entity for goods identified as "medical apparatus and instruments, namely, airway respiratory catheters, tubes and positive airway pressure equipment"; two pending applications for numerous medical products, including "nasal CPAP machines" and "suction catheters"; numerous third-party registrations for goods including catheters used in connection with respiratory disorders; a third-party registration for heart-related medical equipment including catheters; and five excerpts of articles retrieved from the Lexis/Nexis database. Three of the five excerpts were too short to understand the context or nature of the article and, thus, are of no probative value. The following two excerpts are

sufficient to be of some probative value, although we note that the first article pertains to use of a CPAP mask in connection with a procedure that is likely performed in a hospital or clinic setting:

> Headline: Prospective randomized trial comparing oxygen administration during nasal flexible bronchoscopy …
>
> Methods of supplemental oxygen delivery during FB include nasal cannula, Venturi mask, continuous positive airway pressure mask, and pharyngeal catheter.
> [*Chest*, November 1, 2001.]

> Headline: Elder Pharmaceuticals: In need of strong medicine.
>
> Instruments and equipment division: The company also imports and sells various medical equipment and instruments like oxygen concentrators, CPAP units, bone imagers, nebulisers, heart pacemakers and related products like catheters, guidewires, etc.
> [*The Economic Times*, April 9, 2001.]

Applicant contends that, while both marks include the term CONSTELLATION, applicant's mark is not identical to the registered mark; that its unitary mark CONSTELLATION SERIES is not merely descriptive of applicant's goods; and that its mark evokes a different commercial impression from the registered mark because it "suggests a series of constellations rather than *the* constellation." [Brief, p. 11.]

Applicant contends that the respective goods are quite different; that the channels of trade and purchasers are

different; that the cost of each of the products is significantly different; and that, because its products are expensive, they are purchased with great care. Applicant submitted the declaration of Tim Quinn, vice president of applicant's related or parent company, wherein Mr. Quinn made the following statements:

> [Applicant's] CPAP devices for treatment of sleep apnea are sold and used in the home care market. The treatment procedure is performed within the home environment wherein the patient, before going to sleep, puts on a face, mouth, or nasal mask connected to a source of continuous positive airway pressure ("CPCP"). The positive airway pressure delivered to the patient acts as a pneumatic splint and opens up the airways preventing snoring and apnea events during sleep.
>
> No catheters are used with this procedure. Also, the use of the device does not require the assistance of any medical personnel, except for the initial set up and training of the patient by a trained medical personnel.
>
> To my knowledge, catheters such as suction catheters or airway respiratory catheters are rarely sold or used in the home care market. Rather, they are used within hospital or other in-patient clinical settings. They also require administration by a highly trained medical professional because their uses are associated with invasive medical procedures.
>
> To my knowledge, electrophysiology mapping catheters for use in electrical mapping of the heart are specialized catheters that are used only in hospitals with specialized electrophysiology laboratories. These specialized catheters are also not sold or used in the home care market.
>
> The price of a CPAP device ranges from about two hundred fifty dollars to about fifteen hundred dollars. In contrast, catheters such as suction catheters used with ventilators typically sell for

> less than a dollar each and are sold to hospitals in bulk.

In further support of its position, applicant submitted a dictionary definition of "catheter" as "a tubular medical device for insertion into canals, vessels, passageways, or body cavities usually to permit injection or withdrawal of fluids or to keep a passage open" (*Merriam Webster Dictionary*, online edition).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, applicant's mark consists of the registered mark in its entirety, CONSTELLATION, with the addition of the word SERIES, i.e., CONSTELLATION SERIES. CONSTELLATION is an arbitrary term in connection with the respective goods and there is no indication that it is other

than a strong mark in connection with registrant's goods. While we agree with applicant that we must consider the marks in their entireties, we must also consider them in relation to the identified goods. Thus, we find it highly unlikely that the connotation of applicant's mark would be "a series of constellations," as applicant argues. Rather, the connotation of CONSTELLATION SERIES is likely to be substantially similar to the connotation of CONSTELLATION. CONSTELLATION is likely to be perceived as the dominant term in applicant's mark because it is arbitrary in connection with applicant's goods, it is the first term in applicant's mark, and it is followed by a common descriptive term. Further, the term SERIES is likely to be perceived as indicating that the CONSTELLATION SERIES products are part of the line of CONSTELLATION products. For these reasons, we also find that the overall commercial impressions of the two marks are substantially similar. We conclude that the marks are sufficiently similar in appearance, sound, connotation and overall commercial impression that, if used in connection with the same or related goods, confusion as to the source of the goods is likely.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or

services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Systems, Inc. v. Houston Computer Services, Inc.,* 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp*., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The evidence indicates that applicant's identified medical device is a particular non-invasive type of respiratory device that uses continuous positive airway pressure (CPAP) delivered by a facial or nasal mask; and that these medical devices are limited to use for the home care of patients with sleep apnea. It is also clear that,

while patients may use these devices themselves, the device is set up in the home by a trained medical person who trains the patient to use it. In the absence of evidence on this point, we presume that a CPAP device may be purchased both directly from the manufacturer or home health care retailer or from a doctor, who may “prescribe” it for the patient.

It is clear from the evidence that there is a category of catheters used for respiratory therapy. While the registrant’s goods are not limited to catheters for respiratory therapy, such catheters are encompassed by the identification of goods in the registration and would be the type of catheter most closely related to a CPAP unit because both are used in connection with respiratory therapy. However, applicant states that catheters are not used in connection with sleep apnea nor are catheters used for home care. Rather, catheters are used on patients only in hospital or clinic settings; and catheters are inserted by medical personnel into patients in connection with invasive procedures. The patients do not purchase these items (except indirectly as part of the billing for the medical procedure) and are not aware of the source of these products.

The Nexis evidence indicates that CPAP units and catheters, although they are different types of medical devices, have been used along side each other in at least

one study, and may be used together, apparently for different purposes, during various types of invasive medical procedures. The third-party registrations in the record indicate that at least some marks are registered for a wide range of medical products that include both CPAP units and catheters. Finally, we note that the cost of the respective goods is significantly different.

Therefore, we find that the respective goods are different products, used for different respiratory purposes in very different settings (invasive-procedure catheters used in hospitals versus home care devices); that the users and purchasers of the prospective products are quite different (doctors and medical personnel versus the general public with sleep apnea)[3]; and the cost of the respective products is very different.

In conclusion, despite the substantial similarity in the commercial impressions of applicant's mark, CONSTELLATION SERIES, and registrant's mark, CONSTELLATION, the Examining Attorney has not established that the goods are sufficiently related that the contemporaneous use of the respective marks on the goods involved in this case is

[3] We note that there appear to be at least some common purchasers of the respective goods to the extent that medical personnel, including doctors, may be involved in the sale of a CPAP unit to a patient with sleep apnea and medical personnel are involved in the CPAP unit set up and patient training. However, these are sophisticated purchasers who are likely to know the source of the respective goods and, therefore, any confusion as to source among this group of purchasers is likely to be *de minimis*.

likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is reversed.